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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-326

UNITED STATES OF AMERICA,

Petitioner,

-v.-

JAMES W. FERRO,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, included as Appendix A to the petitioner's appendix, is reported at 556 F.2d 630.

QUESTIONS PRESENTED

1. Whether, when the federal government lodges a detainer against a state prisoner, the subsequent production of that prisoner for temporary custody for trial in federal court by means of a writ of habeas corpus ad prosequendum invokes Article IV of the Interstate Agreement on Detainers (hereinafter "Agreement").

2. Whether the Court should review the conclusion of the court below that in light of the Government's failure to show that prior to trial respondent was aware of the lodging of the detainer, respondent may invoke the Interstate Agreement on Detainers for the first time on appeal.

STATEMENT OF THE CASE

On March 19, 1973, Postal Inspector Robert McDowall filed a complaint charging respondent Ferro and co-defendant Cyphers with, inter alia, a fraudulent scheme to obtain airline tickets by use of credit cards. Based on this complaint of March 19, an arrest warrant was issued, and respondent Ferro was arrested the following day.

Ten days after his arrest, on March 30, 1973, respondent Ferro was released on bail. On July 19, 1973, he surrendered to the State of Ohio to serve a term of imprisonment for a prior unrelated conviction under the laws of that State. On September 18, 1973, Indictment 73 Cr. 848 was filed in the Eastern District of New York. Two days later, the Government secured a writ of habeas corpus ad prosequendum (Record on Appeal, Document #9, 73 Cr. 848). Pursuant to that writ, respondent Ferro was transferred to federal custody, arriving at the Federal Detention Center in New York City on September 25, 1973. Approximately one month later, appellant Ferro was returned to state custody, and on November 12, 1973, a federal detainer was lodged against him with Ohio prison officials (PA 9a, 556 F.2d at 634).*

On January 25, 1974, the Government secured a writ of habeas corpus ad prosequendum (Record on Appeal, Document #14, 73 Cr. 848), requesting respondent Ferro's presence in federal custody "for trial" on Indictment 73 Cr. 848. Shortly thereafter, in accordance with the writ, respondent Ferro was transferred to federal custody, remaining at the Federal Detention Center from the end of January until July 1974. During this period, Indictment 73 Cr. 848 was dismissed, and on April 23, 1974, superseding Indictment 74 Cr. 322 was filed. The super-

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*Numerals and letters preceded by "PA" refer to pages of petitioner's appendix.

seding indictment charged respondent Ferro with the same scheme alleged in 73 Cr. 848, and re-alleged Count XX of Indictment 73 Cr. 848 as Count I of Indictment 74 Cr. 322 (PA 9a, 556 F.2d at 634-635).

During the summer of 1974, respondent Ferro was returned to the custody of the State of Ohio. His trial commenced on January 5, 1976, approximately one and one-half years after respondent was transferred to Ohio.

REASONS FOR DENYING THE WRIT

This case presents questions similar to those involved in United States v. Ford, 550 F.2d 630 (2d Cir.), petition for writ of certiorari pending, No. 77-52. For the reasons stated in respondent's brief in opposition for writ of certiorari in Ford,* respondent Ferro contends that the decision below was correct and that there is no conflict in the circuits requiring the Court's resolution on the very narrow question involved: **When the Government files a detainer, burdening the defendant** with the disabilities which were the reasons for enacting the Agreement, and the Government thereafter obtains custody of the defendant, may it nevertheless avoid the requirements of the Agreement by styling its custody request a writ of habeas corpus ad prosequendum.

Further, the Government has also requested review of the Court of Appeals' determination that respondent did not waive his claim under the Agreement, asserting that the same issue is presented in Ford. For the reasons stated in respondent Ford's brief, the Court should decline to review the Second Circuit's resolution of this question. Moreover, the facts here differ from those in Ford and present an even narrower question for review. As the Government noted in its petition for certiorari in Ford at 21 n.16, the Court of Appeals here found that based on its analysis of the record, there was "no showing that [respondent] knew,

*Copies of respondent's brief in opposition for writ of certiorari in Ford are enclosed with this statement. To the extent applicable, respondent Ferro relies on that brief.

prior to trial, that the detainer had been lodged against him." United States v. Cyphers, supra, 556 at 635. Under those limited circumstances, the Second Circuit permitted respondent to raise on appeal the issue involving Article IV(e) of the Agreement, which by its own terms does not refer to any request by the prisoner or defense counsel and is mandatory on its face ("if trial is not had on any indictment...prior to the prisoner's being returned to the original place of imprisonment...such indictment...shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice"). Thus, in light of the unique facts in this case, the Court of Appeals correctly found that respondent did not waive the issue.

CONCLUSION

For the above-stated reasons and reasons presented in respondent Ford's brief in opposition to the Government's petition for writ of certiorari, the petition should be denied.

Respectfully submitted,

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